(2)

Supreme Court, U.S.
FILED
APR 15 1999
OFFICE OF THE CLERK

No. 98-1475

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

ROBERT LEE MASSIE, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
[*Counsel of Record*]
BRUCE ORTEGA
Deputy Attorney General
[State Bar No. 131145]
50 Fremont Street, Room 300
San Francisco, California 94105
Telephone: (415) 356-6157
Counsel for Respondent

3781

QUESTIONS PRESENTED -- CAPITAL CASE

1. "Has jeopardy attached for purposes of the Fifth and Fourteenth Amendments where a capital defendant's guilty plea has been unconditionally accepted and entered by the trial court, sentence has been pronounced, and the condemned has been confined for several years awaiting execution pursuant to the sentence?" Pet. at i.

2. "Is a defendant subjected to double jeopardy pursuant to the Fifth and Fourteenth Amendments where (i) he pleads guilty to felony murder and is sentenced to death by a court with undisputed jurisdiction over the crime and his person, (ii) his conviction is then reversed on state law grounds in a state-initiated automatic appeal which he was denied the right to terminate in state and federal court, and (iii) he is tried a second time on the same information for the same felony murder?" Pet. at i-ii.

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONS, STATUTES OR REGULATIONS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
PETITIONER HAS PRESENTED NO REASON FOR CERTIORARI	7
A. The California Supreme Court Decision Is Not Truly In Conflict With Any Other Decision	8
B. Notwithstanding Any Apparent Conflict, The Issue Raised By It Is Not Of Substantial Importance	10
C. Even If Jeopardy Attached To Petitioner's 1979 Guilty Plea, The 1989 Retrial Did Not Violate Double Jeopardy Principles	11

TABLE OF CONTENTS, CONT'D

1. Petitioner's Situtation Falls Within The Rule That The Double Jeopardy Clause Does Not Bar Retrial After Appellate Reversal 12

2. Because California's Mandatory Review Procedures In Capital Cases Occasioned Petitioner No Violation Of His Double Jeopardy Rights, The "Societal Interests" Served By That Procedure, Although Substantial, Were Not Deemed To "Outweigh Any Constitutional Protection 22

3. The State Is Not Justifying Petitioner's Retrial On A "Continuing Jeopardy" Theory 24

CONCLUSION 27

TABLE OF AUTHORITIES

	Page
Cases	
Ball v. United States 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896)	8
Bayless v. United States 147 F.2d 169 (8th Cir. 1945)	8
Benton v. Maryland 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)	8
Breed v. Jones 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975)	24
Burks v. United States 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)	22
Cox v. State 412 So. 354 (Fla. 1982)	7-8
Dawson v. United States 77 F.3d 180 (7th Cir. 1996)	7
Douglas v. California 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 811 (1963)	18, 19

TABLE OF AUTHORITIES, CONT'D

Faretta v. California
422 U.S. 806, 95 S.Ct. 2525,
45 L.Ed.2d 562 (1975) 17, 19

Furman v. Georgia
408 U.S. 238, 92 S.Ct. 2726,
33 L.Ed.2d 346 (1972) 14, 23

Green v. United States
355 U.S. 184, 78 S.Ct. 221,
2 L.Ed.2d 199 (1957) 14

Gregg v. Georgia
428 U.S. 153, 96 S.Ct. 2909,
49 L.Ed.2d 859 (1976) 14

Hallanan v. Eureka Pipe Line Co.
261 U.S. 393, 43 S.Ct. 414,
67 L.Ed. 715 (1923) 11

In re Eric J.
25 Cal.3d 522, 159 Cal.Rptr. 317,
601 P.2d 549 (1979) 20

Jones v. Barnes
463 U.S. 745, 103 S.Ct. 3308,
77 L.Ed.2d 987 (1983) 18

Kepner v. United States
195 U.S. 100, 24 S.Ct. 797,
49 L.Ed. 114 (1904) 24

TABLE OF AUTHORITIES, CONT'D

Layne and Bowler Corp. v. Western Well Works Inc., et al.
261 U.S. 387, 43 S.Ct. 422,
67 L.Ed. 712 (1923) 10

Marrow v. United States
722 F.2d 525 (9th Cir. 1985) 18

Massie v. Hennessey
875 F.2d 1386 (9th Cir. 1989) 3, 13-16, 25

Massie v. Sumner
624 F.2d 72 (9th Cir. 1980) 2-3, 15

McKane v. Durston
153 U.S. 684, 14 S.Ct. 913,
38 L.Ed 867 (1894) 18

North Carolina v. Pearce
395 U.S. 711, 89 S.Ct. 2072,
23 L.Ed.2d 656 (1969) 13

People v. Andrews
49 Cal.3d 200, 260 Cal.Rptr. 583,
776 P.2d 215 ((1989) 20

People v. Chadd
(1981) 28 Cal.3d 739 (1981) 3

People v. Hale
44 Cal.3d 531, 244 Cal.Rptr. 114,
749 P.2d 769 (1988) 26

TABLE OF AUTHORITIES, CONT'D

People v. Hill
3 Cal.4th 959, 13 Cal.Rptr.2d 775,
839 P.2d 984 (1992) 23

People v. Ledesma
16 Cal.4th 90, 65 Cal.Rptr.2d 610,
939 P.2d 1310 (1997) 17

People v. Massie
40 Cal.3d 620, 221 Cal.Rptr. 140,
709 P.2d 1309 (1985) 3, 18

People v. Massie
19 Cal.4th 550, 79 Cal.Rptr.2d 816,
967 P.2d 29 (1998) 1, 8, 10, 16-18, 20

People v. Powell
40 Cal.App.3d 107, 115 Cal.Rptr. 109 (1974) 15

People v. Snow
44 Cal.3d 216, 242 Cal.Rptr. 477,
746 P.2d 452 (1987) 26

People v. Stanworth
71 Cal.2d 820, 80 Cal.Rptr. 49,
457 P.2d 889 (1969) 16

People v. Superior Court (Marks)
1 Cal.4th 56, 2 Cal.Rptr.2d 389,
820 P.2d 613 (1991) 9

Price v. Johnston
334 U.S. 266, 68 S.Ct. 1049,
92 L.Ed. 1356 (1948) 19

TABLE OF AUTHORITIES, CONT'D

Reed v. Ross
468 U.S. 1, 104 S.Ct. 2901,
82 L.Ed.2d 1 (1984) 22

Rice v. Sioux City Cemetery
349 U.S. 70, 79, 75 S.Ct. 614,
99 L.Ed 897 (1955) 11

Robinson v. Fair Employment & Housing Com.
2 Cal.4th 226, 5 Cal.Rptr.2d 782,
825 P.2d 767 (1992) 17

Ross v. Moffit
417 U.S. 600, 94 S.Ct. 2437,
41 L.Ed.2d 341 (1974) 10, 19, 22

Spaziano v. Florida
468 U.S. 447, 104 S.Ct. 3154,
82 L.Ed.2d 340 (1984) 23

United States v. Cambindo Valencia
(609 F.2d 603 (2d Cir. 1979) 7

United States v. DiFrancesco
449 U.S. 117, 101 S.Ct. 426,
66 L.Ed.2d 328 (1980) 14, 25

United States v. Faber
57 F.3d 873 (9th Cir. 1995) 7

United States v. Felton
753 F.2d 276 (3d Cir. 1985) 7

TABLE OF AUTHORITIES, CONT'D

United States v. Santiago Soto
825 F.2d 616 (1st Cir. 1987) 7

United States v. Scott
437 U.S. 82, 98 S.Ct. 2187,
57 L.Ed.2d 65 (1978) 16

United States v. Tateo
377 U.S. 463, 84 S.Ct. 1587,
12 L.Ed.2d 448 (1964) 13, 23

Zinerman v. Burch
494 U.S. 113, 110 S.Ct. 975,
10 L.Ed.2d 100 (1990) 19

Constitutional Provisions

California Constitution
art. I, § 7 20

United States Constitution
Fifth Amendment 1, 6, 16
Sixth Amendment 2, 17, 18
Fourteenth Amendment 1, 17, 18, 19

TABLE OF AUTHORITIES, CONT'D

Statutes

California Penal Code
§ 187 2
§ 190.2(a) 2
§ 190.4(e) 4
§ 211 2
§ 245 2
§ 1239(b) 2, 4, 16-18, 20, 21, 22
§ 12021 2

United States Code
tit. 28, § 1257 1
tit. 28, § 2254 2, 3

Court Rules

United States Supreme Court Rules of Court
rule 10 8, 10

Other Authorities

Corpus Juris Secundum
(1989 rev.) vol. 22, Criminal Law,
§ 223, p. 272 7

Rotunda, Novak, Young,
Treatise on Constitutional Law: Substance and Procedure (1986) vol. 2, Introduction to Equal Protection, § 18.3, p. 317 20-21

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998
No. 98-1475

ROBERT LEE MASSIE, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*.

OPINION OR JUDGMENT BELOW

Petitioner Massie seeks review of the November 30, 1998, published opinion of the California Supreme Court in *People v. Massie*, 19 Cal.4th 550, 79 Cal.Rptr.2d 816, 967 P.2d 29 (1998), affirming 1989 judgments of conviction and death. The California Supreme Court opinion is attached as petitioner's Appendix to his Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONS, STATUTES OR REGULATIONS

Petitioner relies upon the Fifth Amendment, and section 1 of the Fourteenth Amendment to the United States Constitution. These provisions are set forth in the petition at pages one and two.

STATEMENT OF THE CASE

"On January 3, 1979, petitioner Robert Lee Massie shot and killed Boris Naumoff, the proprietor of a San Francisco liquor store. Massie was arrested two days later." Pet. at 5.

By information filed February 20, 1979, in the San Francisco County Superior Court, the district attorney charged petitioner with the murder, Cal. Pen. Code § 187, and robbery, *id.* at § 211, of Boris Naumoff. (Hereinafter, unless otherwise specified, all statutory references are to the California Penal Code.) The information also charged petitioner with one count of assault with a deadly weapon, § 245, two counts of robbery, § 211, and four counts of possession of a firearm by a convicted felon, § 12021. The information lastly alleged the following two special circumstances attendant to the murder charge: prior murder, § 190.2(a)(3); and robbery murder, § 190.2(a)(17)(i).

On May 8, 1979, just prior to the scheduled beginning of petitioner's trial, he withdrew his not guilty plea and, without his counsel's consent, pleaded guilty to all charges and allegations, including the special circumstances. Following a court penalty trial at which petitioner represented himself, the trial court sentenced him to death on May 25, 1979. An automatic appeal to the California Supreme Court followed pursuant to section 1239(b).

Counsel represented petitioner on appeal. During its pendency, petitioner personally sought to dismiss the appeal. After the state high court denied petitioner's request, he immediately sought habeas relief in the federal courts, 28 U.S.C. § 2254, arguing that his Sixth Amendment right to self-representation entitled him to dismiss his appeal. The federal courts also disagreed, and denied relief. *Massie v. Sumner*, 624 F.2d 72 (9th Cir.

1980), *cert. denied,* 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 828 (1981).

On December 23, 1985, the California Supreme Court reversed petitioner's convictions for the murder and robbery of victim Naumoff and the associated special circumstances under authority of *People v. Chadd*, 28 Cal.3d 739, 170 Cal.Rptr. 798, 621 P.2d 837 (1981), *cert. denied*, 452 U.S. 931, 101 S.Ct. 3066, 69 L.Ed.2d 431. The court held that a "defendant's guilty plea to a capital offense against the advice of counsel cannot be permitted to stand." *People v. Massie*, 40 Cal.3d 620, 625-26, 221 Cal.Rptr. 140, 709 P.2d 1309 (1985). The California Supreme Court directed the trial court "to strike from its records defendant's pleas of guilty and his admission of charged enhancements and special circumstances allegations." *People v. Massie,* 40 Cal.3d at 626.

Following remand, petitioner, on October 20, 1986, moved to dismiss on grounds of double jeopardy. His basic argument, as it is here, was that since he did not consent to the state supreme court's reversal of his initial judgment, retrial was without legal necessity. The trial court denied the motion on November 12, 1986. On January 20, 1987, the California Court of Appeal summarily denied petitioner's pretrial petition for writ of prohibition/mandate seeking to prevent retrial on double jeopardy grounds. The California Supreme Court denied review on March 5, 1987.

Petitioner then sought pretrial relief on his double jeopardy claim in federal court by way of a petition for writ of habeas corpus. 28 U.S.C. § 2254. On December 27, 1988, the district court denied the habeas petition. The Ninth Circuit Court of Appeals affirmed the district court's denial by way of a published decision on May 23, 1989. *See Massie v. Hennessey*, 875 F.2d 1386, 1387-88 (9th Cir. 1989). This Court denied certiorari on March 19, 1990. *Massie v. Hennessey*, 494 U.S. 1039, 110 S.Ct. 1504, 108 L.Ed.2d 639 (1990).

Meanwhile, trial had begun on October 3, 1988, with in limine motions. The trial court impanelled a jury on January 12, 1989. On February 19, 1989, the jury found petitioner guilty of murder and robbery with personal use of a firearm, and found true the robbery-murder special circumstance. The jury returned a true finding on the prior murder special circumstance on February 22, 1989. Following a penalty phase trial, the jury returned a verdict of death on March 30, 1989.

On June 8, 1989, the trial court denied petitioner's motion to modify the verdict pursuant to section 190.4(e), and sentenced him to death.

Petitioner filed his appellant's opening brief in the subsequent automatic appeal, § 1239(b), on December 2, 1995; the People filed their respondent's brief on March 13, 1996; and appellant filed his reply brief on May 22, 1996.

Petitioner filed a state petition for a writ of habeas corpus on August 20, 1996, essentially reiterating his direct review arguments. Petitioner filed a second state petition for a writ of habeas corpus on April 11, 1997.

As noted earlier, on November 30, 1998, the California Supreme Court issued an opinion affirming the judgments of conviction and death.

On December 15, 1998, the California Appellate Project, as amicus curiae, applied for permission to file a brief in the California Supreme Court in support of rehearing.

On January 13, 1999, the California Supreme Court denied the state petitions for a writ of habeas corpus.

On January 27, 1999, the California Supreme Court denied the California Appellate Project's request to file a brief in support of rehearing, and refused to grant rehearing on its own motion.

On February 19, 1999, Justice O'Connor extended petitioner's time within which to file a petition for a writ of certiorari up to and including March 15, 1999.

On March 15, 1999, petitioner filed the instant petition for writ of certiorari from the affirmance of the judgments on his state direct appeal.

SUMMARY OF ARGUMENT

The crux of petitioner's argument is that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution barred his 1989 capital jury trial for the murder of Boris Naumoff. Petitioner reasons as follows: (1) former jeopardy attached at the time of his purported guilty plea to capital charges in 1979; (2) he never consented to having that plea set aside on automatic appeal in 1985, but instead had personally sought to dismiss that appeal; and, therefore, (3) double jeopardy prevented his 1989 retrial following reversal.

While petitioner's argument contains lengthy double jeopardy analysis, he assumes that former jeopardy attached at the time he attempted to plead guilty to capital charges without his attorney's consent. As the California Supreme Court correctly held, that premise is false. And even if the state high court incorrectly so held, under the circumstances of this case, this Court should not grant certiorari to remedy the state court's mistake.

Any possible error could not have prejudiced petitioner. Assuming, arguendo, that jeopardy attached at petitioner's 1979 proceedings, his 1989 trial and conviction did not violate double jeopardy. It is black-letter law that the government may retry a defendant, without running afoul of the Double Jeopardy Clause, after a successful appeal. That is essentially what happened here, and the fact that the state appeal which led to the 1985 reversal of petitioner's 1979 judgment was one which state law did not permit petitioner to waive, is not a fact which takes this case out of the general rule permitting retrial after appellate reversal. Automatic state capital appeals which are unwaivable and where state law further forbids self-representation, are constitutional.

ARGUMENT

PETITIONER HAS PRESENTED NO REASON FOR CERTIORARI

Petitioner believes that the 1989 capital retrial violated his double jeopardy rights. He also believes the California Supreme Court erred in holding that the retrial did not implicate double jeopardy concerns given that petitioner entered an *invalid* guilty plea in 1979, and therefore jeopardy never attached at that time.

> Ordinarily, jeopardy attaches when a defendant enters a plea of guilty, or when the court imposes sentence following the entry of that plea. (See, e.g., *Dawson* v. *United States* (7th Cir. 1996) 77 F.3d 180, 182; *United States* v. *Faber* (9th Cir. 1995) 57 F.3d 873, 875; *United States* v. *Santiago Soto* (1st Cir. 1987) 825 F.2d 616, 618-619; *United States* v. *Felton* (3d Cir. 1985) 753 F.2d 276, 278; *United States* v. *Cambindo Valencia* (2d Cir. 1979) 609 F.2d 603, 637.) Jeopardy does not attach when the plea is invalid, however. "[A]n unlawful guilty plea is null and therefore does not bar a second prosecution for the same offense. Thus, if a court lacks jurisdiction to accept defendant's plea or if the plea violates any statute, then the plea and sentence will not bar reprosecution." (22 C.J.S. (rev. 1989) Criminal Law, § 223, p. 272.) We know of no authority to the contrary.
>
> This case is analogous to *Cox* v. *State* (Fla. 1982) 412 So. 2d 354. There, the trial court, over the prosecutor's objection, accepted a defendant's plea of guilty to a lesser offense included within the crime charged. On an

> appeal by the prosecution, the Florida Supreme Court invalidated the guilty plea, holding that under Florida law the trial court could not accept such a plea without the prosecutor's consent. The court also held that because the guilty plea was invalid, jeopardy had not attached, and the state could again prosecute the defendant without violating the federal Constitution's prohibition against double jeopardy. (*Id.* at pp. 355-356; see also *Bayless* v. *United States* (8th Cir. 1945) 147 F.2d 169, 170.) Here, too, as explained earlier, defendant's guilty plea was invalid. Thus, as in *Cox*, jeopardy did not attach upon entry of the invalid guilty plea. Therefore, the prosecution could try defendant for the murder of store owner Naumoff.

People v. Massie, 19 Cal.4th at 563-64, fn. omitted.

A. The California Supreme Court Decision Is Not Truly In Conflict With Any Other Decision

A well established ground for granting certiorari is the existence of a conflict on an important federal question between the challenged decision and a decision of this Court. Sup. Ct. Rule 10. Here, petitioner believes the state ruling that jeopardy does not attach to a guilty plea invalid under state law stands in conflict with "numerous decisions of this Court," and with decisions of "the circuits, and the state courts of last resort, which hold that jeopardy attaches when a guilty plea is unconditionally accepted before a tribunal with jurisdiction over the crime and the defendant's person." Pet. at 12.

As petitioner points out, *Ball v. United States*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), and *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), hold that jeopardy attaches in a trial based upon

an invalid indictment. This is because in such a situation the trial court has jurisdiction over the parties and cause, and therefore the judgment premised upon the invalid indictment is merely voidable, not void. Accordingly, as noted, jeopardy attaches.

As petitioner points out, in *People v. Superior Court (Marks),* 1 Cal.4th 56, 2 Cal.Rptr.2d 389, 820 P.2d 613 (1991), the California Supreme Court found an attachment of jeopardy where the trial court had proceeded, without "jursidiction" to do so, in the absence of a hearing on the defendant's competence. The California Supreme Court held that, for purposes of double jeopardy analysis, the crucial distinction was between a "fundamental loss of jurisdiction," i.e., "'an entire absence of power to hear or determine the case, an absence of authority over the subject matter of the parties,'" and "an inability to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.'" 1 Cal.4th at 66. A "fundamental" loss of jurisdiction was necessary to prevent the attachment of jeopardy, and none had occurred. *Id.* at 70-71.

Petitioner claims that *Ball, Benton,* and *Marks* make clear that that the attachment of jeopardy is not dependent upon the validity of the judgment under state law, but upon whether the trial court had "fundamental" jurisdiction over the proceeding in which the judgment was returned (authority over the subject matter and parties). As long as the latter exists, jeopardy attaches, petitioner states, irrespective of the former. Petitioner claims the California Supreme Court ignored *Ball, Benton* and *Marks* in his case. Petitioner states that while his guilty plea may have been invalid because the trial court had no power to accept it, since the court had jurisdiction over him and the subject, his judgment was simply "voidable", not "void," and for double jeopardy purposes, jeopardy attached.

To justify a grant of certiorari, the conflict between the lower court and this Court must be truly direct and must be readily apparent from the lower court's rationale and result. That is not this case. The California Supreme Court is correct in finding that, with respect to its holding that jeopardy does not attach to an invalid guilty plea, "there is no authority to the contrary." *People* v. *Massie,* 19 Cal.4th at 564. None of the cases petitioner relies on involve guilty pleas; meanwhile, as the *Massie* court noted, both the Florida Supreme Court in *Cox* and a leading treatise hold that jeopardy does not attach to an invalid guilty plea.

Because the present case involved an invalid guilty plea, not an invalid indictment (*Ball, Benton*), or a judgment invalid in another respect (*Marks*), this Court should not exercise its discretion to grant certiorari. Distinguishable cases create no "conflict."

There must be a real or "intolerable" conflict on the same matter of law, not merely an apparent inconsistency in the general principles involved. *Layne and Bowler Corp. v. Western Well Works Inc., et al.*, 261 U.S. 387, 43 S.Ct. 422, 67 L.Ed. 712 (1923).

B. Notwithstanding Any Apparent Conflict, The Issue Raised By It Is Not Of Substantial Importance

This Court's certiorari review is discretionary and depends on numerous factors other than the perceived correctness of the judgment it is asked to review. *Ross v. Moffit*, 417 U.S. 600, 616-617, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). Indeed Rule 10 of the United States Supreme Court Rules of Court makes clear that this Court, in exercising its discretion on certiorari, looks to see whether the issues are of substantial importance.

Here, petitioner asks this Court to grant certiorari to hold that like an invalid indictment, a judgment stemming from an invalid guilty plea is "merely voidable," not void at its inception, and thus protected by the Double Jeopardy Clause.

This is not an important issue. At most the California Supreme Court below incorrectly applied the general principles surrounding "jurisdiction" and "void" and "voidable" judgments. Few people, apart from petitioner, will be affected by resolution of the question. This case turns on its own special facts and circumstances and is of concern primarily to the parties. Certiorari is in order only when the issue is of importance to the public, as opposed to the parties. *Hallanan v. Eureka Pipe Line Co.*, 261 U.S. 393, 43 S.Ct. 414, 67 L.Ed. 715 (1923).

It is also well established that this Court does not concern itself with issues that are not "beyond the academic or the episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed 897 (1955). As will now be shown, that is this case. Whether jeopardy attached at the time petitioner entered his invalid guilty plea in 1979 is purely an academic question. Resolution of it in petitioner's favor garners him no relief.

C. Even If Jeopardy Attached To Petitioner's 1979 Guilty Plea, The 1989 Retrial Did Not Violate Double Jeopardy Principles

Petitioner, in asking this Court to grant certiorari and reverse the California Supreme Court, invites this Court to hold that his 1989 retrial ran afoul of the Double Jeopardy Clause. This Court need not grant certiorari to determine whether jeopardy attached for petitioner in 1979 because even if it did, the Double Jeopardy Clause properly did not prohibit his 1989 trial.

Petitioner argues that his 1989 retrial "was barred by the Double Jeopardy Clause," and asserts that "the California Supreme Court, led astray by its erroneous conclusion that jeopardy did not attach in Massie's 1979 trial, never reached that point in the analysis." Pet. at 22. Petitioner suggests that this Court's double jeopardy jurisprudence compels the conclusion that his 1989 retrial constituted a double jeopardy violation, and he intimates that this Court should grant certiorari to remedy that violation. Pet. at 22-26.

First, this Court's double jeopardy jurisprudence does not compel the conclusion that petitioner's 1989 retrial constituted a double jeopardy violation. Second, while the California Supreme Court held that jeopardy did not attach at petitioner's 1979 proceedings, petitioner ignores the fact that the state high court did review and correctly reject many of the arguments upon which petitioner's double jeopardy claim is premised.

1. Petitioner's Situtation Falls Within The Rule That The Double Jeopardy Clause Does Not Bar Retrial After Appellate Reversal

The law has long provided that the government may retry a defendant, without running afoul of the Double Jeopardy Clause, after the defendant has appealed and obtained a reversal.

> It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that

> reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

United States v. Tateo, 377 U.S. 463, 466, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964).

Petitioner ignores here that the United States Court of Appeals for the Ninth Circuit, in a case this Court refused to review and which no decision of this Court contradicts, has already held that petitioner's situation falls within the well-settled rule reiterated in *Tateo*.

In *Massie v. Hennessey,* 875 F.2d 1386, *cert. denied*, 494 U.S. 1039, 110 S.Ct. 1504, 108 L.Ed.2d 639, the Ninth Circuit noted first that the Double Jeopardy Clause consists of three separate constitutional protections: it protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and it protects against multiple punishment for the same offense. *Id.* at 1388 (citing *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)). The Ninth Circuit then noted that this Court has explained that the Framers designed the Double Jeopardy Clause "to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Massie v. Hennessey, supra*, 875

F.2d at 1388 (quoting *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

The *Massie v. Hennessey* court noted third that while a primary purpose of the Double Jeopardy Clause is to preserve the finality of judgments, "the 'pronouncement of sentence has never carried the finality that attaches to an acquittal.'" 875 F.2d at 1389 (quoting *United States v. DiFrancesco*, 449 U.S. 117, 133, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980)). "A defendant 'is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.'" *Id.*

> Here, Massie could have no expectation of finality upon sentencing, where California provides for a mandatory appeal upon imposition of a death sentence, even though he challenged that appeal.
>
> The Supreme Court recognizes that the death penalty is different from any other punishment imposed under our system of criminal justice. Because of the uniqueness of that penalty, the Court has held that death cannot be imposed under circumstances where there is a substantial risk that it would be imposed in an arbitrary and capricious manner. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Court has also stated that a statutory scheme that provides for the automatic appeal of all death sentences is an important safeguard against arbitrariness and caprice. *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976).
>
> In line with *Furman* and *Gregg*, California has a concern for ensuring against arbitrariness and caprice in a murder conviction and

> imposition of the death sentence. This most important concern must override any double jeopardy objection Massie may have. This court held previously that the State of California constitutionally may require a higher court review of the death sentence and conviction. *Massie*, 624 F.2d at 74. We observed that in California, the courts have recognized that they have a duty to conduct such a review, which they cannot avoid or abdicate. *Id.* at 73-4. The California Supreme Court's decision upon mandatory appeal in *Massie*, that a trial court cannot accept a guilty plea against the advice of counsel in a capital case, reflects that State's concern that the death penalty be imposed in accordance with the Constitution.

Massie v. Hennessey, supra, 875 F.2d at 1388-89.

The *Massie v. Hennessey* court then ruled that Massie's situation falls within the general rule that an appeal from a judgment of conviction constitutes a waiver of a double jeopardy defense, despite the fact that Massie had attempted to waive his mandatory appeal.

> We reject Massie's argument that because he objected to the mandatory appeal he did not waive the double jeopardy defense. We agree with the California Supreme Court's observation in [*People v.*] *Powell*[,] [40 Cal.App.3d 107, 115 Cal.Rptr. 109 (1974)], that the mandatory appeal is of substantial benefit to defendant and to society regardless of the attempt to waive it, and that "[i]t is not logical that its provisions should operate to the benefit of the accused and to the detriment of society." *Powell,* 40 Cal.App.3d at 143 . . . The appeal is fairly characterized as Massie's even though it is mandatory, and his

> waiver of any defense of double jeopardy must be implied by operation of law.

Massie v. Hennessey, 875 F.2d at 1389.

The *Massie v. Hennessey* court concluded that because the appeal *was petitioner's*, the double jeopardy guarantee of the Fifth Amendment imposed no limitation on the power to retry him. The court held in accordance with the general rule that to require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset the first conviction "'is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect.'" 875 F.2d at 1389 (quoting *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)).

Petitioner asserts that the above analysis fails because it rests upon this illogic: that the automatic appeal provision for capital defendants in California can be considered the "defendant's appeal" when, as here, the defendant Massie did not want it.

Below, the California Supreme Court held that *People v. Stanworth*, 71 Cal.2d 820, 80 Cal.Rptr. 49, 457 P.2d 889 (1969), the case wherein it originally held that California legitimately forbids capital defendants from waiving their appeals, was not wrongly decided and declined petitioner's invitation to overrule it. The *Massie* court noted that not permitting a capital defendant to waive the automatic appeal provided by section 1239(b) is consistent with the legislative purpose behind the statute. *People v. Massie, supra*, 19 Cal. 4th at 566-67. And, the court held:

> We decided *People* v. *Stanworth, supra*, 71 Cal.2d 820, almost 30 years ago. Since then, the Legislature has reenacted section 1239 (Stats. 1982, ch. 917, § 4, p. 3355) and has amended it on two other occasions (Stats. 1975, ch. 1125, §

> 3, p. 2744; Stats. 1988, ch. 551, § 1, p. 2013), but it has never altered section 1239's requirement that "[w]hen . . . a judgment of death is rendered, an appeal is automatically taken by the defendant." The quoted phrase forms the basis for *Stanworth's* holding that an appeal of a judgment of death may not be waived. "'When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts' construction of that statute.'" (*People* v. *Ledesma* (1997) 16 Cal.4th 90, 100-101 [65 Cal.Rptr.2d 610, 939 P.2d 1310], see also *Robinson* v. *Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 235 [5 Cal.Rptr.2d 782, 825 P.2d 767] ["In the absence of legislative history suggesting otherwise, there is a very strong presumption that the Legislature intends that the same construction be given statutory language which has been readopted without change."].)

People v. Massie, supra, 19 Cal.4th at 567-68.

Contrary to petitioner's urgings here, Pet. at 23, n. 4, the automatic appeal provisions for capital defendants in California, § 1239(b), are not violative of the federal Constitution.

In arguing that the automatic appeal provisions violate his Sixth and Fourteenth Amendment rights to control his own defense, petitioner relies primarily on *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), which holds that a criminal defendant has the right of self-representation at trial. However, "'"*Faretta* does not purport . . ." . . . to abrogate the rule . . . that a capital defendant has no right to waive his automatic appeal.'" *People v. Massie*, 19 Cal.4th at 570

(quoting *People v. Massie*, 40 Cal.3d at 624). The state high court also properly rejected the reliance petitioner renews here upon this Court's decision in *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

> Defendant points to isolated comments in federal cases that were decided after our decision in *Massie I* and state that a defendant has the right to decide whether to appeal. (See *Jones* v. *Barnes* . . . 463 U.S. 745, 751 ["[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his own behalf, *or take an appeal*. . . ." (Italics added.)]; *Marrow* v. *United States* (9th Cir. 1985) 722 F.2d 525, 530 ["The decision whether to appeal 'must be the defendant's own choice,' . . . even after a guilty plea. . . ."].) We do not view these passing remarks, taken out of the context in which they arose in noncapital cases, as establishing a rule that a capital defendant who has been sentenced to death has a constitutional right to waive an automatic appeal.

People v. Massie, 19 Cal.4th at 570.

In asking this Court to grant certiorari to declare the automatic appeal provision of section 1239(b) unconstitutional as violative of the Sixth and Fourteenth Amendments, petitioner ignores the fact that there is no federal constitutional right to an appeal. *McKane v. Durston*, 153 U.S. 684, 687-88, 14 S.Ct. 913, 38 L.Ed 867 (1894). Although if, as here, a state has provided for direct appellate review as a matter of right, the state must appoint counsel for indigent defendants on the first appeal, *Douglas v. California*, 372 U.S. 353, 356-57, 83 S.Ct. 814, 9 L.Ed. 811 (1963), that constitutional right to counsel on appeal is not based on the Sixth Amendment.

Rather, *Douglas* premised its holding on Fourteenth Amendment due process and equal protection principles.

> [A] State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." Absolute equality is not required; lines can be and are drawn and we often sustain them. But where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.

Douglas v. California, supra, 372 U.S. at 356-57, citations omitted, original italics.

Since due process is predicated on *fundamental fairness*, *Ross v. Moffitt*, 417 U.S. at 608-09; *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 10 L.Ed.2d 100 (1990), the automatic appeal statute for capital defendants in California, and its concomitant rule that a capital appellant has no right to waive the appeal or seek self-representation, do not violate due process. The automatic appeal and the forbidding of waiver or self-representation promotes fairness in that it promotes the state's interest in ensuring that the capital appellant is afforded a fair and effective appeal. That, of course, insures that the capital appellant received a fair trial and reliable penalty determination.[1]

---

1. This Court in *Faretta* observed that in *Price v. Johnston*, 334 U.S. 266, 68 S.Ct. 1049, 92 L.Ed. 1356 (1948), the holding that a convicted person had no absolute right to argue his or her own appeal, "was in 'sharp contrast' to his 'recognized privilege of conducting his own defense at the trial.'" *Faretta v. California, supra*, 422 U.S. at 816 (citation omitted).

Because California's automatic appeal for capital defendants, along with the corollary rules forbidding waiver and denying self-representation on appeal, do not in any way impair the fairness of the appellate process, they do not violate due process.

Likewise, the fact that California does not provide an automatic appeal for non-capital appellants does not violate the equal protection rights of the capital appellants. As the California Supreme Court held below:

> Defendant further contends that section 1239(b), which prohibits this court from granting requests by defendants sentenced to death to dismiss their automatic appeals, violates his right to equal protection of the laws, as guaranteed by the Fourteenth Amendment to the federal Constitution and article I, section 7 of the California Constitution. We disagree. As we have explained, "the first prerequisite to such a claim is a showing that 'the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.'" (*People* v. *Andrews* (1989) 49 Cal.3d 200, 223 [260 Cal.Rptr. 583, 776 P.2d 215], quoting *In re Eric J.* (1979) 25 Cal.3d 522, 530 [159 Cal.Rptr. 317, 601 P.2d 549], italics omitted.) Section 1239(b) applies to individuals who, like defendant, have been sentenced to death. Defendant fails to identify any other similarly situated group that is affected differently by section 1239(b).

People v. Massie, 19 Cal.4th at 570-71.

Because it is black-letter law that the first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification which affects two or more *similarly situated* groups in an unequal manner, 2 Rotunda, Novak, Young,

Treatise on Constitutional Law: Substance and Procedure (1986) Introduction to Equal Protection, § 18.3, p. 317, petitioner can show no equal protection violation from California's refusal to extend the right to self-representation to appeal from trial. Criminal defendants at trial and criminal appellants are not similarly situated given the profound differences between the trial and appellate stages.[2/]

---

2. There are "significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances 'reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.' [Citation.] [¶] By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any

Given the constitutionality of section 1239(b), and the constitutionality of California's refusal to permit capital appellants to waive their appeals or even represent themselves, it follows that petitioner's appeal in 1979 *was his own*, not just the state's. Absent a showing of exceptional circumstances, petitioner was bound by the tactical decisions of his competent defense counsel, *Reed v. Ross*, 468 U.S. 1, 13, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984), and those tactical decisions led to a reversal. Because of the reversal, California legitimately retried petitioner in 1989 without violating the Double Jeopardy Clause.

2. Because California's Mandatory Review Procedures In Capital Cases Occasioned Petitioner No Violation Of His Double Jeopardy Rights, The "Societal Interests" Served By That Procedure, Although Substantial, Were Not Deemed To "Outweigh Any Constitutional Protection

Petitioner cites this Court's decision in *Burks v. United States*, 437 U.S. 1, 11, n. 6, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), for the proposition that "when the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination." Pet. at 24. This Court should reject petitioner's intimation that it needs to grant certiorari to prevent the state from using "societal interests" or "equities" to outweigh his double jeopardy rights.

This is not a case where petitioner has a legitimate double jeopardy defense that the courts have

---

appeal at all. [Citation.]" *Ross v. Moffitt, supra*, 417 U.S. at 610-11.

refused to enforce on the ground that "societal interests" or "equities" outweigh it. Again, because the automatic unwaivable appeal of petitioner's 1979 guilty plea and death judgment was constitutional and suffered from no other legal infirmity, no double jeopardy violation arose from the state's 1989 retrial of petitioner. Petitioner's retrial fell under the general rule that double jeopardy does not bar retrial after a reversal on appeal. *United States v. Tateo*, 377 U.S. at 466.

Having said that, however, it is true that societal interests support the automatic, unwaivable appeal for capital defendants in force in California. One such convincing reason is expressed or implied in numerous death penalty cases decided by this Court. The punishment of death *is different. It can't be undone.* "In the 12 years since *Furman v. Georgia*, 408 U.S. 238 . . . , every member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, *and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense*." *Spaziano v. Florida*, 468 U.S. 447, 468, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (Stevens. J., dis. opn., fn. omitted, emphasis added). Because this Court has made clear that a state's death penalty laws, to pass constitutional muster, must guard against the imposition of the death penalty in an arbitrary and capricious manner, "the existence of an automatic appeal under state law is not a constitutional defect; it is a constitutional safeguard." *People v. Hill*, 3 Cal.4th 959, 1014, 13 Cal.Rptr.2d 775, 839 P.2d 984 (1992). That is, it protects against arbitrariness and capriciousness in the imposition of death sentences. Thus, not permitting a capital defendant to waive his or her appeal furthers constitutional values.

Furthermore, one of the principles underlying *Stanworth* and California's automatic, unwaivable, no self-

representation capital direct appeal process is that the State of California has an independent interest in the accuracy of the special circumstance and penalty determinations. That interest exists in all capital cases, not just where the defendant asserts it too.

When a court reviews a death sentence over a condemned prisoner's objections, it does so on the ground that society has an independent interest in the integrity of its institutions and its processes. By so doing, however, the court occasions no violence to the Double Jeopardy Clause.

3. The State Is Not Justifying Petitioner's Retrial On A "Continuing Jeopardy" Theory

In dissent, in *Kepner v. United States*, 195 U.S. 100, 134, 24 S.Ct. 797, 49 L.Ed. 114 (1904), Justice Holmes opined that "it seems to me logically and rationally that a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried."

> The jeopardy is one continuing jeopardy from the beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already has been tried once. But there is no rule that a man may not be tried twice in the same case. . . [¶] . . . [T]he prisoner . . . no more more would be put in jeopardy a second time because of a mistake of law in his favor, than he would be when retried for a mistake that did harm. It cannot matter that the prisoner procures the second trial.

Kepner v. United States, 195 U.S. at 134-35 (Holmes, J., dis. opn.).

This "continuing jeopardy" theory of Justice Holmes has never become the law. *Breed v. Jones*, 421 U.S. 519, 534, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). Petitioner is wrong in believing that the California Supreme Court's affirmation of the propriety of his 1989 retrial is essentially premised upon "continuing jeopardy." To repeat, because the automatic, unwaivable appeal of petitioner's 1979 guilty plea and death sentence was *petitioner's appeal* (as well as the state's) and was constitutional and suffered from no other legal infirmity, no double jeopardy violation arose from the state's 1989 retrial of petitioner. The 1989 retrial may have placed petitioner in jeopardy for a second time (not a first "continuing jeopardy"), but the Double Jeopardy Clause did not bar that retrial given the general rule that retrial is permissible after a reversal on appeal.

Petitioner asserts that the notion that his "double jeopardy claim fails because, in view of the automatic appeal provisions of California law, he had no expectation of finality in his conviction and sentence, is merely another way of phrasing the discredited continuing jeopardy theory." Pet. at 25, n. 5. Here petitioner is protesting the *Massie v. Hennessey* holding, in reliance upon *United States v.DiFrancesco*, 449 U.S. 117, that while a primary purpose of the Double Jeopardy Clause is to preserve the finality of judgments, "the 'pronouncement of sentence has never carried the finality that attaches to an acquittal.'" 875 F.2d at 1389. "A defendant 'is charged with knowledge of the statute and its appeal provisions, and has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired.'" *Id.*

That holding does not constitute an application of the "continuing jeopardy" theory against petitioner. The *DiFrancesco* court held that in situations where a particular sentence does not represent an "acquittal" on any greater sentence, the double jeopardy clause does not bar statutory authorization of prosecutorial appeals of the

sentence. And, because the defendant was aware that his sentence was subject to appellate review, his legitimate expectations would not be defeated should his sentence be increased. Application of *DiFrancesco* to the present case is not inappropriate given that under the California death penalty statutes it is a conviction on the underlying murder charge and attendant special circumstances that triggers the penalty (sentencing) trial, and given that an illegal conviction can poison the reliability of a subsequent death *sentence* just as much as any penalty trial error. *See e.g., People v. Hale*, 44 Cal.3d 531, 244 Cal.Rptr. 114, 749 P.2d 769 (1988); *People v. Snow*, 44 Cal.3d 216, 242 Cal.Rptr. 477, 746 P.2d 452 (1987).

CONCLUSION

Accordingly, for all of the foregoing reasons, the People of the State of California respectfully ask this Court to deny the petition for writ of certiorari.

Dated: April 13, 1999.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
RONALD A. BASS
Senior Assistant Attorney General
RENÉ A. CHACÓN
Supervising Deputy Attorney General
[*Counsel of Record*]

Bruce Ortega

BRUCE ORTEGA
Deputy Attorney General
[State Bar No. 131145]
50 Fremont Street, Room 300
San Francisco, California 94105
Telephone: (415) 356-6157
Counsel for Respondent